

LONE STAR STEEL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-101

Decided June 8, 1987

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming the issuance of Notice of Violation No. 84-3-11-15(1) and imposing a civil penalty of \$ 240. TU 4-13-P.

Affirmed in part, reversed in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally -- Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSMRE fails to issue a notice of proposed penalty assessment within 30 days of issuance of a notice of violation under 30 CFR 723.17(b), but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Probability of Occurrence -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program -- Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

4. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

When an Administrative Law Judge reduces the number of points assigned for a violation under 30 CFR 723.13(b) to fewer than 30, and that violation is not contained in a cessation order, the assessment of a civil penalty may be waived under 30 CFR 723.12(c). When the Administrative Law Judge declines to waive the penalty without providing a rationale, but the record demonstrates clearly that the permittee exercised diligence in attempting to prevent the violation, and demonstrated good faith in abating the violation, a civil penalty of \$ 240 is properly waived.

APPEARANCES: Virgil D. Medlin, Esq., Oklahoma City, Oklahoma, for petitioner; Paulette Andrud, Esq., Office of the Regional Solicitor, Denver, Colorado; Nell Fickie, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma; and Anne C. Greer, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Lone Star Steel Company (Lone Star) has petitioned for discretionary review of a September 30, 1985, decision of Administrative Law Judge 2Frederick A. Miller concluding that Notice of Violation (NOV) No. 84-3-11-15(1) was validly issued, and reducing the civil penalty assessed by the Office of Surface Mining Reclamation and Enforcement (OSMRE) from \$ 1,200 to \$ 240. By order dated November 25, 1985, the Board granted the petition.

This case involves the Milton Mine, a Federal coal reserve mine located in sec. 13, T. 8 N., R. 23 E., LeFlore County, Oklahoma, which Lone Star had mined previously pursuant to permit No. 78/81-011, issued by the State of Oklahoma on June 29, 1977. On June 30, 1980, Oklahoma issued a renewal permit to Lone Star with the same permit number, effective from July 1, 1980, to "approval of permanent program application." Lone Star submitted its permanent program permit application on March 22, 1982, and proceeded with surface coal mining operations under its interim permit No. 78/81-011. 1/ By letter dated February 1, 1984, OSMRE informed Lone Star that OSMRE had reconsidered the need to re-permit the Milton Mine under Oklahoma's permanent program regulations. OSMRE determined that since actual coal removal had ceased less than 8 months after the completed permanent program application was due, Lone Star could complete reclamation of the mined area and obtain a bond release in accordance with the interim program. 2/

1/ At the time of OSMRE's inspection in this case, Oklahoma's State program was in effect, having been approved by OSMRE on Jan. 19, 1981, subject to the conditions set forth in 30 CFR 936.11. 30 CFR 936.10; see 46 FR 4910 (Jan. 19, 1981). The regulations at 30 CFR Part 740 set forth the general performance standards for surface coal mining and reclamation operations on Federal lands, providing that such operations shall be conducted "in accordance with the performance standards of the applicable regulatory program." 30 CFR 740.19(a). Oklahoma's approved regulatory program provides that an operator conducting operations under a permit issued during the initial regulatory period may continue operations under such permit if certain criteria are met:

"(a) Timely and complete application for a permit under the permanent regulatory program has been made to the Department in accordance with the provisions of the Act, this Subchapter and the regulatory program;

"(b) The Department has not yet rendered an initial decision with respect to such application; and

"(c) The operations are conducted in compliance with all terms and conditions of the interim permit, the requirements of the Federal Act, Parts 710, 715, 716, and 717 of the initial regulatory program, and the State statutes and regulations."

Okla. Gaz. § 771.13; see 30 CFR 740.13(a)(3) (identical to the Oklahoma regulation in all material respects).

2/ This determination is consistent with Citizens for the Preservation of Knox County, 81 IBLA 209 (1984), in which the Board ruled that an operator who has ceased all coal mining operations prior to the approval of a State's permanent program is not required to obtain a permanent program permit to conduct only reclamation activities.

On March 24, 1984, an OSMRE inspector visited the Milton Mine, which was in its reclamation phase. On the date of his visit, the inspector saw approximately 30 head of cattle on the west end of the permitted property. He issued NOV No. 84-3-11-15(1) charging a violation of interim program regulation 30 CFR 715.20(e)(2), which reads in part:

Livestock grazing will not be allowed on reclaimed land until the seedlings are established and can sustain managed grazing. The regulatory authority, in consultation with the permittee and the landowner or in concurrence with the governmental land managing agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.
3/

Lone Star filed a petition for review on August 3, 1984, contesting the fact of the violation and the amount of the \$ 1,200 civil penalty. A hearing was held before Judge Miller in Tulsa, Oklahoma on May 14, 1985. Lone Star stipulated at the hearing that cattle were on the property on the day that the NOV was issued (Tr. 5). The superintendent for Lone Star's contractor testified that he saw cattle on the permit area on March 26 and 28 (Tr. 35), and that Lone Star did not have permission from the regulatory authority to allow cattle to graze on the permit area (Tr. 43).

Judge Miller ruled that the evidence demonstrated a clear violation of 30 CFR 715.20(e)(2) and that NOV No. 84-3-11-15(1) was validly issued. His analysis of the regulation and his summary of the evidence is set forth below:

Petitioner's interpretation of the word "allow" in the regulation is not appropriate. The regulation reads that "grazing will not be allowed * * * until * * * [t]he regulatory authority * * * determine[s] * * * the revegetated area is ready". Petitioner contends that "allow" refers to acts of the permittee and since it did not "allow" the cattle to be on the mine site it cannot be held accountable for the cattle being there. However, "allow" refers to the regulatory authority and indicates that the act of grazing is not permitted until it says the area is ready. Since the regulatory authority had not given permission to graze livestock on the Milton Mine site no livestock could be on the area.

Petitioner also argues that since the lease for the Milton Mine site is pre-law that petitioner is exempt from the requirements of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1201 et. seq.) (the Act). However, this assertion is without any basis of authority. The purpose of the Act is the regulation of surface coal mining operations, not the regulation of leases between operators and land owners. Since this

3/ The permanent program regulation relating to grazing on revegetated areas, 30 CFR 816.115, was promulgated on Mar. 13, 1979. 44 FR 15236. That regulation was deleted in 1983. 48 FR 40146, 40160 (Sept. 2, 1983).

mine is required to operate within the Act and its regulations, petitioner's pre-law lease does not exempt it from the revegetation standards (i.e., that grazing will not be allowed without permission of the regulatory authority). The fact that the land owner did not agree to be bound by the Act when the lease was made does not relieve the permittee from its responsibility. A permittee is a proper party to be issued a notice of violation under the Act. Wilson Farms Coal Co., 2 IBSMA 118.

The parties have stipulated at the hearing that there were cattle "on the permit area on the date in question that the notice of violation was issued" (Tr. 5). Mr. Doss [James E. Doss, Superintendent for Lone Star's contractor] testified that he saw cattle on the mine site on March 26 and 28, 1984 (Tr. 35). Mr. Doss also testified that Lone Star Steel did not have permission from the regulatory authority to allow cattle to graze on the permit area, but that cattle would get on the permit area and graze (Tr. 43). All of this evidence demonstrates a clear violation of 30 C.F.R. § 715.20(e)(2) which prohibits grazing without permission from the regulatory authority. Therefore, it is the opinion of the undersigned that Notice of Violation No. 84-3-11-15 was validly issued and is accordingly affirmed.

(ALJ Decision at 3).

Judge Miller ruled, however, that OSMRE had improperly applied the civil penalty formula in 30 CFR 845.13(b)(2). ^{4/} He found that since Lone Star had no history of violations that OSMRE was proper in assessing no history points. His consideration of the remaining three categories of seriousness, negligence, and good faith, is set forth below:

The category of seriousness of a violation has a total of thirty (30) points divided into two subsections of fifteen (15) points each. 30 C.F.R. § 845.13(b)(2). The first subsection of the seriousness section is the "probability of occurrence" the regulation was promulgated to prevent. 30 C.F.R. § 845.13(b)(2)(i). Petitioner has been assigned thirteen (13) points in this category which will be reduced to ten. Although ten points still translates into the occurrence will "likely" happen, the most serious damage, would have resulted from continued grazing and the record indicates that the violation was quickly abated.

The second subsection of the seriousness category is the "extent of damage". 30 C.F.R. § 845.13(b)(2)(ii). The petitioner was assigned seven (7) points which is within the range

^{4/} The civil penalty regulations at 30 CFR Part 845 apply to notices of violation (NOV) and cessation orders (CO) issued under the permanent regulatory program. Since the NOV in this case was issued pursuant to an interim program regulation, the civil penalty regulations at 30 CFR Part 723 are applicable. The significance of this distinction is discussed infra in this opinion.

for when the event happens on the permit area. 30 C.F.R. § 845.13(b)(2)(ii)(A). This is appropriate because there had been "removal of part of the vegetation" and "stippling of the pasture with the cattle hoofs", which are both on the permit area (Tr. 12). Therefore, the undersigned believes this point assignment is appropriate and should remain as it is.

The category of negligence [sic] is for failure of the permittee to prevent the occurrence of any violation due to indifference, lack of diligence or lack of reasonable care. 30 C.F.R. § 845.13(b)(3)(ii)(B). The petitioner was assigned twelve (12) points for negligence which does not seem warranted by the record. Mr. Kenneth Olive, chief geologist for Lone Star Steel Company, testified that the petitioner had people in its employ who checked the mine site nearly every day for intruding cattle. He also testified that one employee had used trained dogs to chase cattle off the property (Tr. 46). This does not sound like the mark of a company which was indifferent toward the violation. Therefore, the twelve (12) points assigned for negligence are reduced to zero.

The fourth category of the formula is good faith which is assigned a negative value for the speed in which the violator abated the violation. 30 C.F.R. § 845.13(b)(4). Petitioner's efforts at preventing the cattle from coming onto the property and its efforts at promptly removing them once discovered indicate good faith compliance. Inspector Lett testified that he believed that the operator did timely remove the cattle from the area and that good faith should be considered (Tr. 22). Respondent agreed with that statement in its brief. Therefore, a point value of minus five (-5) will be awarded to petitioner for good faith.

(ALJ Decision at 4). Accordingly, Judge Miller reduced the civil penalty points from 32 to 12, thus reducing the penalty assessment from \$ 1,200 to \$ 240.

Lone Star's challenge to Judge Miller's ruling that OSMRE's issuance of the NOV was proper centers around an argument that his application of 30 CFR 715.20(e)(2) amounted to an imposition of strict or absolute liability. Lone Star complains that Judge Miller neglected to rule at any time as to the issues of law which Lone Star presented in its pre-hearing pleadings or in the hearing itself. The issue of law of most concern to Lone Star is "[w]hether Public Law 95-87 and 30 C.F.R. § 715.20(e)(2) are to be interpreted as holding petitioner to a standard of strict or absolute liability to which it has or is allowed no defense" (Lone Star Brief at 4). According to Lone Star, while 30 CFR 715.20(e)(2) imposes a standard of reasonable care, it "does not expressly by its language nor does the regulation impliedly impose a higher standard of care and make the permittee strictly or absolutely liable under any and all circumstances" (Lone Star Brief at 4-5). [Emphasis in original.] Moreover, Lone Star argues "the statute under which the regulation was promulgated does not expressly or impliedly hold the permittee to a standard of strict or absolute liability." *Id.* at 5. Lone Star contends even if

the regulation does impose strict liability, it has the right to interpose a defense to its application, i.e., that Lone Star had "done everything humanly possible to carry out the duty imposed by the regulation," and that "[n]o amount of foresight or prudence would have prevented the cattle in light of the circumstances from entering the land to graze" Id. at 10. Finally, Lone Star asserts that if the regulation imposes strict liability, it is invalid by exceeding statutory authority.

[1] Lone Star complains that it should have been allowed to interpose a defense to the violation cited in the NOV. Lone Star argues that it took all necessary and reasonable steps to control cattle, but was prevented from doing so by circumstances beyond its control. At the hearing before Judge Miller, Lone Star presented evidence to show that it had warned adjacent landowners to keep their cattle off the permitted site (Tr. 27, 47), that it had threatened legal action against one landowner in an attempt to protect the permitted area from grazing (Tr. 47), that it maintained fences around the permit site (Tr. 18), and that it conducted daily inspections to ensure that cattle were not grazing on the permitted area (Tr. 35). In addition, a witness for Lone Star testified that a section of the fence was destroyed by two bulls (Tr. 33-34).

The fact that Lone Star took numerous measures to ensure compliance with the regulation, which ultimately failed, does not relieve it from such compliance. Judge Miller correctly posed the following factual issue for resolution: "Whether cattle were grazing on the Milton Mine site without permission from the regulatory authority." (ALJ Decision at 2). The answer to that question is yes. The legal conclusion to be drawn from that factual finding is that Lone Star violated 30 CFR 715.20(e)(2).

Lone Star believes the Judge's conclusion amounts to a holding of strict or absolute liability, and that he erred in failing to consider its defenses to violation. Lone Star's argument fails to recognize the nature of OSMRE's enforcement authority. OSMRE is authorized to issue notices of violation (or cessation orders) for violations of statutory, regulatory or permit requirements. It is also authorized to levy civil penalties for those violations. The regulation at 30 CFR 715.20(e)(2) requires that no grazing take place without the approval of the regulatory authority. When grazing takes place prior to such approval, a violation exists. If as a result of that violation, Lone Star were liable for a certain civil penalty amount which could not be mitigated, one could conclude that strict or absolute liability obtained. Such is not the case. All the facts surrounding Lone Star's attempts to keep cattle from grazing on the permit area are appropriate for consideration as mitigating factors in determining the amount of the civil penalty. They are not, however, relevant to whether or not there was, in fact, a violation of the regulations. 5/

5/ To the extent Lone Star may be arguing that an inability to comply with 30 CFR 715.20(e)(2) requires vacation of the NOV, that argument must be rejected. As pointed out by OSMRE, 30 CFR 722.17(a) expressly provides that neither a notice of violation nor a cessation order may be vacated because of an inability to comply. Inability to comply may only be considered in mitigation of the amount of the civil penalty. 30 CFR 722.17(c).

Judge Miller properly determined there was a violation of 30 CFR 715.20(e); therefore, we turn to Lone Star's arguments regarding the civil penalty.

Lone Star criticizes Judge Miller's ruling on the civil penalty question on two bases (Lone Star Brief at 17). First, Lone Star maintains that Judge Miller failed to address the prejudice that resulted from OSMRE's mailing the proposed penalty assessment 108 days after the NOV was issued, in violation of 30 CFR 845.17(b), 6/ which requires OSMRE to serve the notice of proposed penalty assessment within 30 days after issuance of the NOV. The prejudice asserted by Lone Star is that "only at the time he receives notification of the amount of the penalty is he able to ascertain whether or not he desires to employ the experts and incur the expense of offering a defense to the alleged violation" (Lone Star Brief at 18). Second, Lone Star contends that Judge Miller erred in affirming the assignment of seven points under the seriousness category of 30 CFR 845.13(b)(2)(ii)(A), relating to "extent of damage." Lone Star's view is that the maximum number of 7 points was excessive, given that the duration of the damage was 4 to 5 hours, and the damage was "not extensive." Thus, Lone Star requests that the civil penalty be reduced to zero.

[2] Lone Star's contention that it was prejudiced by OSMRE's failure timely to issue its notice of proposed assessment is based upon 30 CFR 723.17(b), which requires OSMRE to "serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order." The prejudice asserted by Lone Star is that due to OSMRE's lengthy delay, the condition on the permit site at the time the NOV was issued may be impossible to "reconstruct," and that damage caused in removing the cattle may be impossible to differentiate from the damage done previously. (Lone Star Brief at 18). Thus, it states "how is one to differentiate the condition at the time of inspection once rain has fallen and made impossible the taking of pictures or taking evidence of what the inspector saw at the time he was on the scene." Id.

OSMRE answers that Lone Star admitted that it would not "gather" evidence concerning an NOV until it received the notice of proposed assessment, whether it received that notice 30 or 108 days later. Such delay does not amount to a "disadvantage in asserting and establishing a claimed right or defense, or other damage caused by detrimental reliance on plaintiffs conduct" (OSMRE Brief at 5, quoting Peques v. Morehouse Parish School Board, 632 F.2d 1279 (5th Cir. 1980)). In short, OSMRE contends that Lone Star failed to show the "actual prejudice" necessary for relief from the NOV.

We agree with OSMRE. In Badger Coal Co., 2 IBSMA 147, 87 I.D. 319 (1980), The Board addressed the question of whether OSMRE's failure to hold an informal assessment conference within 60 days after a request "should result in the vacation of both a notice of violation or cessation order and the resulting

6/ The proper citation is 30 CFR 723.17(b), the text of which is identical to 30 CFR 845.17(b).

civil penalty." 2 IBSMA at 151, 87 I.D. at 321. The Board's reasoning provides the criteria by which to evaluate Lone Star's contention:

If OSM fails to hold a conference within 60 days, and if the person assessed a civil penalty timely objects to this failure and can prove actual prejudice, some relief may be appropriate. * * * [A]n Administrative Law Judge should be free to exercise discretion in fashioning appropriate relief for failure to hold the conference within 60 days. However, the relief must address the prejudice shown. Therefore, appropriate relief would not include vacating a notice of violation or cessation order. It might be appropriate to reduce the civil penalty, but except in rare circumstances it seems unlikely that sufficient prejudice could be shown to justify vacating it.

2 IBSMA at 152, 87 I.D. at 322.

Lone Star has failed to prove "actual prejudice" to its case as a result of OSMRE's failure to issue the notice of proposed assessment within 30 days from issuance of the NOV. The delay in issuance of the notice of proposed assessment did not preclude Lone Star from documenting the conditions existing on the site at the time of the issuance of the NOV. In fact, the extent of damage in existence at the time of issuance of the NOV is a factor for consideration in assigning points to determine a civil penalty. The issuance of a notice of proposed assessment within 30 days is no guarantee that conditions at the site have not changed.

[3] Lone Star questions Judge Miller's affirmation of the point assignment under the extent of damage subsection of 30 CFR 845.13(b)(2)(ii). ^{7/} Before turning to the substance of Lone Star's argument, we note that OSMRE properly cited Lone Star for violating 30 CFR 715.20(e)(2), an interim program regulation. Because the violation did not create an imminent danger to the health or safety of the public or a significant, imminent environmental harm, OSMRE issued an NOV as authorized under 30 CFR 722.12(a). Assessment of civil penalties for NOV's issued under 30 CFR Part 722 is governed by 30 CFR Part 723. This point is somewhat academic, since the assessment regulations at 30 CFR Part 723 are now, and were at the time of assessment, identical to those found at 30 CFR Part 845; ^{8/} however, the preamble to the final regulations at 30 CFR Part 723 is useful in evaluating Lone Star's challenge to OSMRE's assignment of points and Judge Miller's review thereof.

The regulation at 30 CFR 723.13(b)(2) which addresses the seriousness of a violation from two angles, provides as follows:

^{7/} Throughout the remainder of this decision, unless otherwise noted, all references to the civil penalty regulations will be to 30 CFR Part 723, rather than 30 CFR Part 845.

^{8/} Effective Sept. 4, 1980, the regulations at 30 CFR 723.2 through 723.18 were "changed to be exactly the same * * * as the corresponding permanent regulations (30 CFR 845.2-845.20)." 45 FR 58780.

(i) Probability of occurrence. The Office shall assign up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. * * *

(ii) Extent of potential or actual damage. The Office shall assign up to 15 points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

(A) If the damage or impact which the violated standard is designed to prevent would remain within the permit area, the Office shall assign zero to seven points, depending on the duration and extent of the damage or impact.

(B) If the damage or impact which the violated standard is designed to prevent would extend outside the permit area, the Office shall assign eight to fifteen points, depending on the duration and extent of the damage or impact.

We note that Lone Star's criticism of the calculation of assessment points extends only to the assignment of the maximum of seven points for extent of damage under 30 CFR 723.13(b)(2)(ii)(A). Lone Star does not contest Judge Miller's assignment of 10 penalty points for probability of occurrence under 30 CFR 723.13(b)(2)(i). However, our review of the two subsections of 30 CFR 723.13(b)(2), which in our opinion should be considered and applied together in cases such as this, will demonstrate why no civil penalty should have been assessed against Lone Star for the violation involved herein.

The predecessor of 30 CFR 723.13(b)(2) included an example to illustrate what is meant by the phrase "probability of occurrence":

(1) Probability of occurrence. The probability of the occurrence of the event which a violated standard is designed to prevent may account for a maximum of 15 penalty points. (An example of the concept of the phrase "the event which a violated standard is designed to prevent" is as follows: Mishandling of topsoil is a violation of the topsoil standard in section 715.16 of this chapter; however, delay or failure in revegetation and resulting environmental harm are the events which the topsoil standard in section 715.16 of this chapter is designed to prevent.)

30 CFR 723.12(c)(1) (1977). ^{9/}

The preamble to this final rule further explained the second component of seriousness, the extent of potential or actual damage: "This concept is designed to weigh the scope of the harm as if the event had occurred against

^{9/} This regulation was redesignated 30 CFR 723.13(b)(2)(i) when the civil penalty regulations at 30 CFR Part 723 were revised effective Sept. 4, 1980. Also, the example set forth in 30 CFR 723.12(c)(1) was deleted. 45 FR 58780.

which the violated standard was designed to prevent." 43 FR 62671 (Dec. 13, 1977). The preamble provides two examples. The potential or actual damage involved in the first example, referred to as "catastrophic," contrasts sharply with the limited extent of potential or actual damage involved in Lone Star's violation of 30 CFR 715.20(e)(2):

[F]ailure of a refuse dam and consequent flooding is the event which the standards dealing with the construction of refuse dams are designed to prevent. Such a failure would have impact, probably catastrophic, far outside the permit area. Thus, any violation of a construction standard would be assigned the maximum 15 points under the second component of the seriousness test contained in § 712.11(c)(2), even though the probability of such a failure resulting from the particular violation is insignificant and, therefore, assigned only 0 to 5 points under § 723.12(c)(1).

43 FR 62671 (Dec. 13, 1977).

Lone Star's violation, limited to a small portion within the permit area, is more akin to the second example of how the Department intended the seriousness subsection of the penalty point assignment schedule to be applied:

If the violation is a failure to spread topsoil over a relatively small area in a relatively flat terrain where the underlying strata is a good growing medium, the probability of a revegetation failure and erosion is insignificant. Furthermore, any failure or erosion would be very localized and probably only affect land within the permit area. In such a case, 0 to 5 points would be assigned for probability of occurrence and 0 to 7 points for extent of potential or actual damage.

43 FR 62671 (Dec. 13, 1977). On the other hand, the preamble explains that "[i]f the area is large, on a steep slope, near the permit boundary and the uppermost layer is a poor growing medium, then revegetation failure and erosion are likely and the environmental harm will spread off the permit area." *Id.* In these circumstances, "10 to 15 points would be awarded for probability of occurrence and 8 to 15 points for extent of potential or actual damage."

The above examples provide somewhat concrete standards for applying 30 CFR 723.13(b)(2)(i) and (ii) in Lone Star's case. Failure to prevent livestock grazing on the permit area is a violation of the revegetation requirement in 30 CFR 715.20(e)(2). As in the example included in the original probability of occurrence subsection of 30 CFR 723.13(b), delay or failure in revegetation and resulting environmental harm are the events which the grazing prohibition in 30 CFR 715.20(e)(2) is designed to prevent. Judge Miller's findings in connection with the negligence and good faith categories (30 CFR 723.13(b)(3)(ii)(B) and 723.13(b)(4)) establish that Lone Star attempted in numerous ways to prevent cattle from grazing on the permit area, all without the cooperation of landowners surrounding that area. The entire permit area was fenced (Tr. 18), and Lone Star made every effort to keep its neighbors' cattle off the property. The violation occurred at a time when the reclamation phase was near completion, and when OSMRE had recommended a partial bond

release on the area (Tr. 16). In fact, OSMRE's inspector testified that he inspected the site in 1983 with OSMRE's technical services personnel and that they were "very much impressed with the diversity of the plant cover. We were very much impressed also with the amount of plant cover" (Tr. 16). Thus, the probability of revegetation failure, given the progress of revegetation on the site and the conscientious manner in which Lone Star supervised this permit area, removing the cattle promptly when they were discovered, appears to be slight. Thus, we reduce the points assigned for this subsection to one, since, based on these facts, the probability of vegetation failure is insignificant.

Further, the grazing took place for relatively short periods of time and the cattle were promptly removed when their presence was discovered by Lone Star or brought to its attention (Tr. 22). While OSMRE's inspector testified that at the time the NOV was issued the vegetation had been affected by the grazing, he also testified that "the vegetation was not adversely affected to the point of recovery from the grazing effects as I observed them at the time of the violation on March 28" (Tr. 18). During cross-examination, OSMRE's inspector mentioned the positive effects of grazing, which are relevant to the degree of potential or actual damage considerations (Tr. 21). facts of this particular case, we reduce the penalty points for actual or potential damage to one, in light of the limited extent and duration of the violation.

We find that Judge Miller properly assigned minus five points under 30 CFR 723.13(b)(4) for Lone Star's good faith efforts to comply with 30 CFR 715.20(e)(2). The two penalty points which we have assigned under the seriousness category are cancelled by the assignment for good faith. Thus, we rule that Lone Star should not have been assessed a civil penalty for its violation of 30 CFR 715.20(e)(2).

[4] Even if the penalty points assigned by Judge Miller were correct, regulation 30 CFR 723.12(c) provides an alternative basis for not imposing a civil penalty against Lone Star in this case. That regulation provides that OSMRE "may assess a penalty for each notice of violation assigned 30 points or less under the point system described in § 723.13. In determining whether to assess a penalty, the [OSMRE] shall consider the factors listed in § 723.13(b)."

OSMRE is granted discretion under 30 CFR 723.12(c) in determining whether to impose a civil penalty for a violation cited in an NOV rather than in a CO for which fewer than 30 penalty points are assigned. See *Mud Fork Coal Corp.*, 5 IBSMA 44, 56-58, 90 I.D. 181, 187-88 (1983). OSMRE originally assigned 32 points for the violation involved in this case, and having made that assignment, was required to render the \$ 1,200 assessment initially imposed. However, we think it would have been proper for Judge Miller, having reduced the civil penalty to \$ 240, to waive imposition of that civil penalty, since he had assigned only 12 points for the violation. While he stated that he chose not to waive the civil penalty assessment, he offered no reasons for that ruling. His discussion of Lone Star's diligence in attempting to prevent the violation, and good faith in abating the violation, strongly supports waiving the civil penalty of \$ 240.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Miller's decision affirming issuance of the NOV is affirmed, but his assignment of a total of 12 penalty points and the related assessment of \$ 240 for the violation cited therein is reversed, and this case is remanded to OSMRE for action consistent with this decision.

Bruce R. Harris
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Franklin D. Arness
Administrative Judge.

